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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Tom Raatz, et al.,

10 Plaintiffs,

11 v.

12 Dealer Trade Incorporated, et al.,

13 Defendants.
14

No. CV-16-00170-PHX-DGC

ORDER

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16 Defendant Pinnacle Nissan, LLC moves for summary judgment against Plaintiffs
17 Tom Raatz, Marcine Raatz, and TMR, LLC pursuant to Federal Rule of Civil
18 Procedure 56. Doc. 66. The motion is fully briefed (Docs. 82, 84), and no party requests
19 oral argument. The Court will grant the motion.

20 **I. Background.**

21 The facts are undisputed. On May 28, 2015, Pinnacle purchased a 2010 Infinity
22 QX56, VIN 5N3ZA0NEXAN900968 (the “Vehicle”), at the Manheim automobile
23 auction for \$26,500.00. Doc. 67, ¶ 1; Doc. 83 at 2.¹ Pinnacle, an automobile retailer,
24 purchased the Vehicle with the intent to resell it. Doc. 67, ¶ 2. The Vehicle was placed
25 in the Manheim auction by True Credit Auto Wholesale. *Id.*, ¶ 3. At the time Pinnacle
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27 ¹ Citations to paragraphs in the parties’ statements of fact refer to both the
28 paragraphs and any responses included immediately thereunder. Citations to page
numbers refer to numbers attached at the top of the pages by the Court’s CMECF system,
not page numbers of the original document.

1 purchased the Vehicle, its odometer registered 35,497 miles, as reflected on the secured
 2 odometer statement Pinnacle received. *Id.*, ¶ 4. In addition to the Vehicle, Pinnacle
 3 purchased “Deal Shield” from Manheim for an extra \$150. *Id.*, ¶ 5. Under “Deal
 4 Shield,” Pinnacle retained the right to return the Vehicle for any reason within 21 days of
 5 purchase for a full refund, provided the Vehicle’s mileage did not exceed 35,747 miles.
 6 *Id.*, ¶ 6; Doc. 67-1 at 11.

7 On June 9, 2015, Pinnacle exercised its right under Deal Shield and returned the
 8 Vehicle. Doc. 67, ¶ 7. Manheim issued Pinnacle a full refund, and Pinnacle supplied a
 9 secured odometer statement registering 35,578 miles to Meridian Remarketing, an
 10 affiliate of Manheim that took title to the Vehicle. *Id.*, ¶¶ 8-9. On June 25, 2015,
 11 Meridian sold the Vehicle to Dealer Trade, Inc. d/b/a Luxury Motorsports (“Dealer
 12 Trade”). *Id.*, ¶ 10. At that time, the Vehicle’s odometer registered 35,580 miles
 13 according to the secure odometer statement provided by Meridian to Dealer Trade. *Id.*
 14 In late August or early September 2015, Dealer Trade sold the Vehicle to Plaintiffs and
 15 supplied a secured odometer statement showing the Vehicle’s odometer registered 35,648
 16 miles. *Id.*, ¶¶ 11-12. After completing the purchase, Plaintiffs took the Vehicle to Willis
 17 Infinity Dealership in Iowa, where they allegedly learned that the Vehicle actually had
 18 more than 46,731 miles. *Id.*, ¶ 13; Doc. 1 at 3; Doc. 83-1 at 2, ¶¶ 4-5.²

19 On January 25, 2016, Plaintiffs filed this action against Dealer Trade and Pinnacle,
 20 alleging violations of the Federal Motor Vehicle Information and Cost Savings Act, 49
 21 U.S.C. § 32701 et seq., also known as the Federal Odometer Act (“FOA”). Doc. 1 at 4.

22 **II. Legal Standard.**

23 A party seeking summary judgment “bears the initial responsibility of informing
 24 the district court of the basis for its motion, and identifying those portions of [the record]
 25 which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*
 26

27 ² Pinnacle objects, as untimely, to Mr. Raatz’s affidavit provided as an attachment
 28 to the amended response to Pinnacle’s statement of facts Doc. 84 at 4. Although
 untimely, the affidavit was not changed in a material way, and the Court will accept and
 consider the amended filings in this order.

1 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
 2 evidence, viewed in the light most favorable to the nonmoving party, shows “that there is
 3 no genuine dispute as to any material fact and the movant is entitled to judgment as a
 4 matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a
 5 party who “fails to make a showing sufficient to establish the existence of an element
 6 essential to that party’s case, and on which that party will bear the burden of proof at
 7 trial.” *Celotex*, 477 U.S. at 322. Only disputes over facts that might affect the outcome
 8 of the suit will preclude the entry of summary judgment, and the disputed evidence must
 9 be “such that a reasonable jury could return a verdict for the nonmoving party.”
 10 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

11 **III. Analysis.**

12 The FOA’s purposes, as set out by Congress, are “(1) to prohibit tampering with
 13 motor vehicle odometers; and (2) to provide safeguards to protect purchasers in the sale
 14 of motor vehicles with altered or reset odometers.” 49 U.S.C. § 32701(b). The FOA
 15 prohibits odometer tampering with intent to change the mileage registered by the
 16 odometer, as well as sale of devices intended to make the odometer register mileage
 17 different from the actual mileage driven. *Id.* § 32702 (1)-(2). The FOA also imposes
 18 disclosure requirements. *Id.* § 32705(a). Under regulations that implement the statute,
 19 “each transferor shall disclose the mileage in writing on the title” or “on the
 20 document being used to reassign the title,” and the transferor must certify that “to the
 21 best of his knowledge the odometer reading reflects the actual mileage.” *Id.*; 49 C.F.R.
 22 § 580.5 (c), (e). If the transferor knows the odometer to have a calibration error, or to be
 23 unreliable, it must also include a statement to that effect. *Id.*

24 The FOA creates a private right of action. “A person that violates this chapter or a
 25 regulation prescribed or order issued under this chapter, *with intent to defraud*, is liable
 26 for 3 times the actual damages or \$10,000, whichever is greater.” *Id.* § 32710(a)
 27 (emphasis added); *see also Bodine v. Graco, Inc.*, 533 F.3d 1145, 1147 (9th Cir. 2008)
 28 (“[A]n [FOA] claim that is brought by a private party . . . requires proof that the vehicle’s

1 transferor intended to defraud a transferee with respect to mileage.”).

2 The key question in this motion is whether Plaintiffs have enough evidence to
3 create a question of fact on whether Pinnacle acted with an “intent to defraud” as required
4 by the statute. The parties cite no decision from the Ninth Circuit on the meaning of
5 “intent to defraud,” but, as Plaintiffs note, courts applying the FOA have not read the
6 statute as requiring a specific intent to defraud the transferee of a vehicle. Instead, cases
7 generally have held that a sufficient intent to defraud may be inferred if the defendant
8 acted with reckless disregard for the truth. As one circuit explained:

9 The approach taken by the great majority of courts is sensible. If a
10 person violates an odometer disclosure requirement with actual knowledge
11 that he is committing a violation, a fact finder can reasonably infer that the
12 violation was committed with an intent to defraud a purchaser. Likewise, if
13 a person lacks knowledge that an odometer disclosure statement is false
14 only because he displays a reckless disregard for the truth, a fact finder can
15 reasonably infer that the violation was committed with an intent to defraud
a purchaser. The inference of an intent to defraud is no less compelling
when a person lacks actual knowledge of a false odometer statement only
by closing his eyes to the truth.

16 *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248, 1253-54 (8th Cir. 1983) (quotation
17 marks, brackets, and citation omitted).

18 Plaintiffs rely on this legal standard in arguing that the summary judgment motion
19 should be denied, but they present only two pieces of evidence in support of their claim
20 that Pinnacle acted with reckless disregard for the truth. First, Plaintiffs note that
21 Pinnacle returned the Vehicle under the Deal Shield after only 11 days and without
22 explanation. They argue that a jury could reasonably infer that Pinnacle did so because it
23 discovered that the odometer mileage was incorrect. Doc. 82 at 9. Second, Plaintiffs
24 assert that an Infinity dealership in Iowa discovered from the Vehicle’s service records
25 that it had almost 50,000 miles in 2011, and argue – with no additional evidence – that
26 Pinnacle could have discovered the same information through reasonable diligence. *Id.*

1 The Court does not agree that this evidence would be sufficient for a reasonable
2 jury to return a verdict for Plaintiffs. *Anderson*, 477 U.S. at 248. Notably, Plaintiffs did
3 not seek additional discovery before responding to the Pinnacle’s motion, as they could
4 have under Rule 56(d). Plaintiffs instead chose to stand on the evidence addressed in
5 their response. That evidence includes no indication that Pinnacle had any reason to
6 suspect that the odometer reading in the Vehicle it held for only 11 days was incorrect.
7 Plaintiffs cite nothing from Pinnacle witnesses or records to suggest that something or
8 someone put Pinnacle on notice that the odometer was incorrect. They provide no
9 evidence that Pinnacle performed maintenance on the Vehicle or had access to the same
10 maintenance records that were found by the Iowa dealer. Nor do they present evidence
11 that dealers normally do or should check odometer readings against maintenance records
12 upon acquiring vehicles. Recklessness is defined as “[c]onduct whereby the actor does
13 not desire harmful consequence but nonetheless foresees the possibility and consciously
14 takes the risk.” Black’s Law Dictionary (10th ed. 2014). Plaintiffs present no evidence
15 that Pinnacle foresaw the possibility that the odometer was wrong and nonetheless chose
16 to take that risk.

17 Cases cited by the parties generally include some fact that put the transferor of a
18 vehicle on notice that the odometer was wrong. In *Tusa*, for example, the title itself
19 included erasure marks showing that the mileage amount had been altered. The court
20 described these marks as “clear and apparent.” 712 F.2d at 1254. Despite this fact, the
21 dealer undertook only superficial efforts in reporting the mileage to the transferee. *Id.*
22 Other cases include similar facts. *See, e.g., Suiter v. Mitchell Motor Coach Sales, Inc.*,
23 151 F.3d 1275, 1282-83 (10th Cir. 1998) (plaintiff presented evidence that the dealer
24 performed an inspection of the vehicle in question and found several inconsistencies that
25 the dealer then recklessly ignored); *Nieto v. Pierce*, 578 F.2d 640 (5th Cir. 1978) (dealer
26 failed to investigate the odometer reading of a 10-year-old truck with only 14,736 miles);
27 *Alexander v. Southeastern Wholesale Corp.*, 2014 WL 1165844 at *5 (E.D. Va. Mar. 21,
28 2014) (dealer provided plaintiff with a false odometer disclosure despite having requested

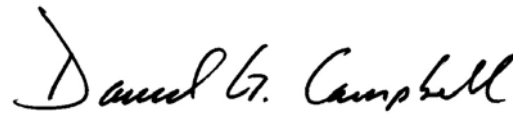
1 and received a CARFAX vehicle history report displaying inconsistent information as to
2 the vehicle's age and mileage); *Hall v. Riverside Lincoln Mercury-Sales*, 499 N.E.2d 156
3 (Ill. App. Ct. 1986) (service documents found in the car by the dealer had conflicting
4 higher-mileage odometer readings). Plaintiffs have presented no comparable evidence in
5 this case.

6 Nor could a reasonable jury find that Pinnacle acted with intent to defraud simply
7 because it returned the Vehicle for a refund after 11 days. A jury could not find such a
8 return, by itself, so suspicious as to suggest a fraudulent intent to hide an incorrect
9 odometer. To the contrary, it is undisputed that Pinnacle purchased Deal Shield when it
10 purchased the Vehicle and precisely so that it could return the Vehicle for a full refund
11 within 21 days. Pinnacle asserts that Deal Shield "affords the dealership flexibility to
12 purchase vehicles at the auction, while simultaneously evaluating whether a surplus of
13 similar inventory exists that would limit the prospects of selling it for a profit," and
14 "allows the dealership the chance to purchase automobiles throughout the course of the
15 auction, and upon its conclusion, return those it deems are less likely to sell." Doc. 84 at
16 3.

17 In summary, Plaintiffs have failed to present sufficient evidence to create a
18 genuine issue of fact on whether Pinnacle acted in reckless disregard of the truth when it
19 stated the mileage of the Vehicle. Plaintiffs have presented no evidence that Pinnacle
20 acted fraudulently, or had reason to know that the mileage was incorrect and proceeded in
21 reckless disregard of that fact. As noted above, summary judgment is appropriate against
22 a party which "fails to make a showing sufficient to establish the existence of an element
23 essential to that party's case, and on which that party will bear the burden of proof at
24 trial." *Celotex*, 477 U.S. at 322. Only disputes over facts that might affect the outcome
25 of the suit will preclude the entry of summary judgment, and the disputed evidence must
26 be "such that a reasonable jury could return a verdict for the nonmoving party."
27 *Anderson*, 477 U.S. at 248. Because Plaintiffs have failed to present such evidence, the
28 Court will grant Pinnacle's motion for summary judgment.

1 **IT IS ORDERED** that Pinnacle's motion for summary judgement (Doc. 66) is
2 **granted.**

3 Dated this 6th day of January, 2017.

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8 David G. Campbell
9 United States District Judge
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